1 General Principles of Drafting & Relevant Substantive Rules

This Chapter Includes

- Introduction;
- Drafting, its Meaning;
- Conveyancing, its Meaning;
- Drafting and Conveyancing: Distinguished;
- Distinction between Conveyance and Contract;
- General Principles of Drafting all sorts of Deeds and Conveyancing & other Writings;
- Some Do’s & Don’ts;
- Guidelines for Use of Particular Words and Phrases for Drafting & Conveyancing;
- Use of Appropriate Words and Expressions;
- Aids to Clarity and Accuracy;
- Legal Implications and Requirements;
- Deed and Document;
- Various Kinds of Deeds;
- Components of Deeds;
- Engrossment and Stamping of a Deed.

Marks of Short Notes, Distinguish Between, Descriptive & Practical Questions

Question upto Dec - 2008 are from CS Final Gr. I Old Course and from June - 2009 onwards are from CS Professional Programme New Course.

8.1
2005 - Dec [7] (b) Write short notes on the following:
   (ii) Fowler’s five rules of drafting. (3 marks)

Answer:
Fowler’s Five Rules of Drafting: As per “anyone who wishes to become a good writer should endeavour, before he allows himself to be tempted by more showy qualities, to be direct, simple, brief, vigorous and lucid.”

   The principle referred to above may be translated into general in the domain of vocabulary as follows:
   (a) Prefer the familiar word to the far fetched (familiar words are readily understood).
   (b) Prefer the concrete word to the abstract (concrete words make meaning more clear and precise).
   (c) Prefer the single word to the circumlocution (single word gives direct meaning avoiding adverb and adjective).
   (d) Prefer the short word to the long (short word is easily grasped).
   (e) Prefer the Saxon word to the Roman (use of Roman words may create complications to convey proper sense to an ordinary person to understand).
   (f) Always prefer active voice to the passive voice in the drafting of documents.

2006 - Dec [8] (b) Write brief notes on ‘force majeure’ and ‘deed escrow’. (5 marks)

Answer:
Deed Escrow: A deed signed by one party and delivered to another as an “escrow” for it is not a perfect deed. Until and unless the deed’s signed by all the parties are dated when the last party signs it. It is merely writing (Scriptum). The deed operates from the date it is last signed. Escrow means a simple writing not to become the deed of the expressed to be bound thereby, until some condition should have been performed. (Halsbury Laws of England, 3rd Edn., Vol. II, p. 348).
**Force Majeure**: Means Acts of God, wars or similar action affecting India, Civil Commotions or general strike (excluding by its own employees) lying beyond the reasonable control.

2007 - June [6] (b) Write short notes on any three of the following:

(i) Testimonium clause
(ii) Indenture
(iii) Deed Escrow
(iv) Habendum.

Answer:

(i) **Testimonium Clause**: The clause of the deed is marked by this clamps and is an integral part of the deed. Testimonium is the clause in the last part of the deed. Testimonium signifies that the parties to the document have signed the deed. This clause marks the close of the deed and is an essential part of the deed.

The usual form of testimonium clause is as under:

"In witness whereof, parties hereto have hereunto set their respective hands and seals the date and year first above written". This is the usual English form of testimonium clause. In India, except in the case of companies and corporations seals are not used and in those cases testimonium clause reads as under:

"In witness whereof the parties hereto have signed this day on the date above written."

Thus testimonium clause can be worded according to the status and delegation of executants.

(ii) **Indenture**: Deeds in which there are two or more than two parties is referred to as indenture. It was written in duplicate upon one piece of parchment and two parts were severed so as to leave an indented or vary edge, forging being then, rendered very difficult. Indentures were so called as at one time they are indented or cut with uneven edge at the top. In olden times, the practice was to make as many copies or parts as they were called, of the instruments as they were parties to it, which parts taken together formed the deed and to engross all of them of the same skin of parchment.

(iii) Please refer 2006 - Dec [8] (b) on page no. 16
(iv) **Habendum**: Habendum is a part of deed which states the interest yet to be taken by the purchaser. Habendum clause starts with the words "THE HAVE AND TO HOLD". Formerly in England in case of a gratuitous transfer, the equitable interest wherein remained with the transferor and the transferee was not deemed to be the owner of the beneficial interest. It was therefore, necessary to indicate in the deed that it was being transferred for the use of the transferee if it was intended to confer an equitable estate in him. It was for that reason that the *habendum* commenced with the words: "to have to hold to the use of.............". Now it is not necessary to express it so. In the modern deeds, however, the expression "to have and" are omitted. The *habendum* limits the estate mentioned in the parcels. The transferee is mentioned again in the habendum for whose use the estate is conveyed. If the property conveyed is encumbered, reference thereto should be made in the *habendum*. If the parties to transfer enter into covenants, they should be entered after the habendum.

2010 - Dec [5] Write notes on the following:
(i) **Habendum** (4 marks)

Answer:
*Please refer 2007 - June [6] (b) (iv) on page no. 17*

2010 - Dec [7] (b) Write a note on ‘covenants and undertakings’. (5 marks)

Answer:
*Please refer 2008 - June [6] (b) of Chapter - 2 on page no. 45*

2013 - June [8] (b) Write a note on ‘covenants and undertakings’. (4 marks)

Answer:
*Please refer 2008 - June [6] (b) of Chapter - 2 on page no. 45*

2013 - Dec [4] Write notes on the following:
(i) **Habendum and reddendum** (4 marks)
HABENDUM

(i) Habendum is a part of deed which states the interest, the purchaser is to take in the property. The habendum clause starts with the words, “THE HAVE AND THE HOLDS”

(ii) Formerly in England, if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property.

(iii) The habendum limits the estate mentioned in the parcels.

(iv) In India, such phrases as “to have and to hold” or such an expression as “to the use of the purchaser” can very well be avoided as in cases except those of voluntary transfers, such an expression is superfluous.

REDDENDUM

This is peculiar to a deed of lease. Here is mentioned this mode and time fixed for payment. It begins with the word “rendering or paying” with reference to the reserved rent is payable during the terms of the lease. Place where payable and instalment where mentioned. If there is apportionment of rent that is also mentioned.

2014 - Dec [3A] (Or) Write notes on the following:

(i) Covenants and undertakings. (4 marks)

Answer:
Please refer 2008 - June [6] (b) of chapter 2 on page no. 45

Distinguish between

2006 - June [7] (a) Distinguish between ‘contract’ and ‘conveyance’. (5 marks)

Answer:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Conveyance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Any right of any action is not created in conveyance.</td>
<td>(a) It alters the ownership of existing right.</td>
</tr>
<tr>
<td>(b) Provisions of Indian Contract</td>
<td>(b) Whereas it is governed by the</td>
</tr>
</tbody>
</table>
Act, 1872 governs any contract.

(c) Contract remains to be performed and its specific performance may be sought.

(d) A contract to mortgage or sale would not amount to activate thus per of interest in the property.

Transfer of Property Act, 1882.

(c) Conveyance passes on the title of property to another person.

(d) The deed of mortgage or sale would operate as conveyance of such interest.

2007 - Dec [6] (b) Distinguish between the following:

(iii) ‘Deed’ and ‘instrument’. (4 marks)

Answer:

Instrument: The word "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

Deed: The term deed describes all the instruments by which two or more persons agree to effect any right or liability. For example, Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on. A bond is also included in the wide field of expression ‘Deed’.

A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, confirm assign, limit or extinguish some right, title or interest.

2008 - Dec [8] (d) Distinguish between ‘drafting’ and ‘conveyancing’. (3 marks)

Answer:

Distinction between drafting and conveyancing: Both the terms "drafting and conveyancing" provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas "drafting" gives a general meaning synonymous to preparation or drafting of documents. Documents may include document relating to transfer of property as well as other "documents" in a sense as per definition given in Section 3 (18) of the General Clauses Act, 1897 which include any matter
written, expressed or described upon any substance by means of letters figures or mark, which is intended to be used for the purpose of recording that matter. For example, for a banker the document would mean loan agreement, deed of mortgage, charge pledge, guarantee, etc. For a businessman document would mean something as demanded under Section 2(4) of the Indian Sale of Goods Act, 1930 so as to include a document of title to goods i.e. "Bill of lading, dock warrant, warehouse-keepers certificate, wharfingers certificate, railway receipt multi model transport document warrant or order for the delivery of goods and any other document used in ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented". The Companies Act, 2013 defines vide Section 2(3b) the term "document" in still wider concept so as to include "summons, requisitions order, other legal process and registers, whether issued, sent or kept in pursuance of this or any other Act, or otherwise". Thus, drafting may cover all types of documents in business usages.

In India, the commercial houses banks and financial institutions have been using the term "documentation". In substitution of the words "drafting and conveyancing". Documentation refers to the activity which symbolises preparation of documents including finalisation and execution thereof.

2009 - June [3] (a) Distinguish between the following:
(i) 'Conveyance' and 'contract'.  (4 marks)
(ii) 'Instrument' and 'deed'.  (4 marks)
Answer:
(i) Please refer 2006 - June [7] (a) on page no. 19
(ii) Please refer 2007 - Dec [6] (b) (iii) on page no. 20

2009 - Dec [4] (b) Distinguish between the following:
(i) 'Document' and 'deed'.  (3 marks)
Answer:

<table>
<thead>
<tr>
<th>Document</th>
<th>Deed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Document has been defined by general clauses Act, 1894.</td>
<td>(i) There is no specific definition of deed in any act.</td>
</tr>
<tr>
<td>(ii) It means any matter expressed or</td>
<td>(ii) Deed usually describes all the</td>
</tr>
</tbody>
</table>
8.8

<table>
<thead>
<tr>
<th><strong>8.8</strong></th>
<th><strong>Solved Scanner CS Prof. Prog. M-III Paper 8 (New Syllabus)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>described upon any substance by means of letters figures or marks, or by more than one of those means which is intended to be used, or which may be used for the purpose of recording that matter.</td>
<td>instruments by which two or more persons agree to effect any right or liability.</td>
</tr>
<tr>
<td>(iii) E.g. a writing, a map or plan, words printed, photo graphed etc.</td>
<td>(iii) E.g. partnership deed, deed of family, lease deed etc.</td>
</tr>
</tbody>
</table>

2011 - June [7] (b) Distinguish between the following:

(i) 'Endorsements' and 'supplemental deed'.

**Answer:**

**Endorsement & Supplemental deed**

Endorsement means to write on the back or on the face of a document where in it is necessary in relation to the contents of that document or instruments. The term endorsement is used with reference to negotiable documents like -

(a) Cheque
(b) Bill of exchange
(c) Hundies etc.
(d) Promissory notes.

For e.g. - On the back of the cheque to sign one name as payee to obtain cash is an endorsement on the cheque.

Supplemental deed - is a document which is entered into between the parties on the same subject on which there is a prior/ex documents existing an operative for adding new fact to the document on which the parties to the document have agreed which otherwise cannot be done by way of endorsement. Thus supplemental deed is executed to give effect to the new fact in the deed.

2011 - Dec [7] (b) Distinguish between the following:

(i) ‘Conveyance’ and ‘contract’.

**Answer:**

Please refer 2006 - June [7] (a) on page no. 19
2013 - Dec [7] (b) Distinguish between the following:
   (i) ‘Legal document’ and ‘instrument’. (3 marks)

Answer:
Legal Document:
   (i) “Document” as defined in section 31(18) of general clause Act, 1894, means any matter expressed or described upon any substance by means of letters, figures or marks.
   (ii) which may be used for the purpose of recording that matter.

Example:
   A writing is a document.
   Words printed, lithographed or photographed are document.

Instrument:
The word “instrument” includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

2014 - June [2A] (Or) Distinguish between the following:
   (i) ‘Indenture’ and ‘deed escrow’. (4 marks)

Answer:
Indenture: Indenture are those deeds in which there are two or more parties. It was written in duplicate upon one piece of parchment and two parts were severed so as to leave an indented or vary edge, forging being then, rendered very difficult. Indentures were so called as at one time they are indented or cut with uneven edge at the top. In olden times, the practice was to make as many copies or parts as they were called, of the instruments as they were parties to it, which parts taken together formed the deed and to engross all of them of the same skin of parchment.

Deed Escrow: A deed signed by one party will be delivered to another as an “escrow” for it is not a perfect deed. It is only a mere writing (Scriptum) unless signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed. Escrow means a simple writing not to become the deed of the expressed to be bound thereby, until some condition should have been performed.

2015 - June [2A] (Or) Distinguish between the following:
   (iii) ‘Habendum’ and ‘reddendum’. (4 marks)
2006 - June [5] {C} (c) What is meant by 'recitals' as a component in a deed? What is its evidentiary value? (5 marks)

Answer:

Recitals: Recitals contain the short story of the property up to its vesting into its transferors. Care should be taken that recitals are short and intelligible. Recitals may be of two types. One, narrative recitals which relates to the past history of the property transferred and sets out the facts and instrument necessary to show the title and relation to the party to the subject matter of the deed as to how the property was originally acquired and held and in what manner it has developed upon the grantor or transferor. The extent of interest and the title of the person should be recited. It should be written in chronological order i.e. in order of occurrence. This forms part of narrative recitals. This is followed by industry recitals, which explain the motive or intention behind execution of deed.

Recitals should be inserted with great caution because they precede the operative part and as a matter of fact contain the explanation to the operative part of the deed. If the same is ambiguous recitals operate as estoppel. Recital offers good evidence of facts recited therein. Recitals are not generally taken into evidence but are open to interpretation by the courts. If the operative part of the deed is ambiguous anything contained in the recital will help in its interpretation or meaning. In the same sense, it is necessary that where recitals contain chronological events that must be narrated in chronological order.

Recital generally begins with the words "Whereas" and when there are several recitals instead of repeating the words "Whereas" before each and every one of them, it is better to divide the recitals into numbered paragraphs for example, "Whereas"-

1.
2.
3.
etc.

It has been held that "Recitals" carry evidentiary importance in the deed. It is an evidence against the parties to the instrument and those claiming under and it may operate as estoppel [Ram Charan v. Girija Nandini, 3 SCR 841 (1965)].
(b) Define and differentiate between the following terms:
(i) Instruments;
(ii) Document; and
(iii) Deed.

Answer:

(i) **Instrument**: The word "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

(ii) **Document**: Document as per General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. As for instance, a writing is a document, words printed, lithographed or photographed are documents; a map or plan of a place or stone is a document. A caricature is a document. Thus document is a paper or other material thing affording information, proof or evidence of anything.

(iii) **Deed**: The term deed connects all the instruments by which two or more persons agree to effect any right or liability.

A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

A deed is a present grant rather than a mere promise to be performed in the future. Deeds are in writing, signed, sealed and delivered. Deeds are instruments, but all instruments are not deeds.

All deeds are documents. But it is not always that all documents are deeds. A document under seal may not be a deed if it remains undelivered e.g., a will, an award, a certificate of admission to a learned society, a certificate of shares or stocks and share warrant to bearer, an agreement signed by directors and sealed with the company’s seal, license to use a patented article or letters of coordinations.
2006 - June [8] (a) “Drafting of document is a skilled man’s job.” Explain this statement with some important do’s and don’ts in drafting. (5 marks)

Answer:
The essence of the process of drafting is synthesis of law and fact in a language. A proper understanding of drafting cannot be realised unless the nexus between the law, the facts and the language is fully understood and accepted. This requires serious thinking followed by prompt action to reduce the available information into writing with a legal meaning.

Some Do’s:
1. Reduce the group of words to single word;
2. Use simple verb for a group of words;
3. Avoid round-about construction;
4. Avoid unnecessary repetition;
5. Write shorter sentences;
6. Express the ideas in fewer words;
7. Prefer the active to the passive voice sentences;
8. Choose the right word;
9. know exactly the meaning of words and sentences you are writing; and
10. Put yourself in the place of reader, read the document and satisfy yourself about the content, interpretation and the sense it carries.

Some Don’ts: The following things should be avoided while drafting the documents:
(a) Avoid the use of words of same sound. For example, the words “Employer” and “Employee”.
(b) When the clause in the document is numbered it is convenient to refer to any one clause by using single number for it. For example, “in clause 2 above” and so on.
(c) Negative in successive phrases would be very carefully employed.
(d) Draftsman should avoid the use of words "less than" or "more than", instead they must use "not exceeding".
(e) If the draftsman has provided for each of the two positions to happen without each other and also happen without, "either" will not be sufficient; he should write "either or express the meaning of the two in other clauses."
In writing and typing the following mistakes always occur which should be avoided:
1. "And" and "or";
2. "Any" and "my";
3. "Know" and "now";
4. "Appointed" and "Applied";
5. "Present" and "Past" tense.

2007 - Dec [6] (a) What are the important principles which a draftsman should keep in mind in drafting and conveyancing? (3 marks)

Answer:
The following principles of drafting & conveyancing must be adhered to:
(a) Fowler’s five principles of drafting. According to Fowler, "anyone who wishes to become a good writer should endeavour, before he allows himself to be tempted by more showy qualities, to be direct, simple, brief, vigorous and lucid".

The principle referred to above may be translated into general in the domain of vocabulary as follows:
(i) Prefer the familiar word to the far fetched (familiar words are readily understood).
(ii) Prefer the concrete word to the abstract (concrete words make meaning more clear and precise).
(iii) Prefer the single word to the circumlocution (single word gives direct meaning avoiding adverb and adjective).
(iv) Prefer the short word to the long (short word is easily grasped).
(v) Prefer the Saxon word to the Roman (use of Roman words may create complications to convey proper sense to an ordinary person to understand).
(vi) Always prefer active voice to the passive voice in the drafting of documents.
(b) Outline the contents of a document before drafting.
(c) Skeleton draft and its self-appraisal.
(d) Legal provisions must be complied with.
2009 - June [1] {C} Attempt the following:
(i) Define 'document'. Explain various kinds of deeds. (5 marks)

**Answer:**
**Document:** Document according Section 31 (18) of General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. As for instance, a writing is a document, words printed, lithographed or photographed are documents; a map or plan is a place or stone is a document. A caricature is a document. Thus, document is a paper or other material thing affording information, proof or evidence of anything.

**Various kinds of Deeds:**
1. A good deed is one which conveys a good title, not one which is good merely in form.
2. A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.
3. An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.
4. A latent deed is a deed kept for twenty years or more in man's escritoire or strong box.
5. A lawful deed is a deed conveying a good or lawful title.
6. A pretended deed is a deed apparently or prima facie valid.
7. A voluntary deed is one given without any "valuable considerations".
8. A warranty deed is a deed containing a covenant of warranty.

2009 - June [5] (a) Explain in detail the general principles of drafting and conveyancing and other writings. (12 marks)

**Answer:**
Drafting of legal documents requires skill. At the very first instance, the names, description and the addresses of the parties to the instrument must be ascertained by a draftsman. He must obtain particulars about all necessary matters which are required to form part of the instrument. He must also note down with provision any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument. The duty of
a draftsman is to express the intention of the parties clearly and concisely in technical language. With this end in view, he should first form a clear idea of what these intentions are.

A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney.

It is also to be ensured that the format of documents adopted adheres to the customs and conventions in vogue in the business community or in the ordinary course of legal transactions. For any change in the form of such document, use of juridical and technical language should invariably be followed. The statements of negatives should generally be avoided. The order of the draft should be strictly logical. Legal language should be, to the utmost possible extent, precise and accurate. The draft must be readily intelligible to layman.

Document should be supported by the schedules enclosures or annexures in case any reference to such material has been made in that.

2009 - Dec [1] {C} Attempt the following :
(b) Define ‘deed’. What are the components of a deed in general ?

Answer :
A deed is a writing-
(a) paper, vallum or parchment,
(b) sealed and
(c) delivered, whereby an interest, right or property passes, or an obligation binding on some persons is created or which is in affirmance of some act whereby an interest, right or property has been passed.
A deed is a present grant rather than a mere promise to be performed in the future.

Deeds are in writing, signed, sealed and delivered.

Deeds are instruments, but all instruments are not deeds.

A deed is divided into different paragraphs. Under each part relevant and related information is put in paragraph in simple and intelligible language. The usual parts or components or clauses of deeds in general are mentioned as follows:

1. Description of the Deed Title
2. Place and Date of execution of a Deed
3. Description of Parties to the Deed
4. Recitals
5. Testatum
6. Consideration
7. Receipt Clause
8. Operative Clause
9. Description of property
10. Parcels Clause
11. Exceptions and Reservations
12. Premises and Habendum
13. Covenants and undertakings
14. Testimonium Clause
15. Signature and attestation
16. Endorsements and supplemental Deeds
17. Annexures or Schedules.


**Answer:**

Habendum is a part of deed which states the interest, the purchaser is to take in the property. Habendum clause starts with the words "THE HAVE AND TO HOLD". Formerly in England if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property, the equitable estate wherein remained with the transferor as a resulting trust for him. It was therefore, necessary to indicate in the deed that...
it was being transferred for the use of the transferee if it was intended to confer an equitable estate in him. It was for that reason that the *habendum* commenced with the words: “to have to hold to the use of ..........”. Now it is not necessary to express it so. In the modern deeds, however, the expression “to have and” are omitted. The *habendum* limits the estate mentioned in the parcels. The transferee is mentioned again in the habendum for whose use the estate is conveyed. Whatever precedes the *habendum* is called the premises. The parcels or the description of the property usually again included in the premises. If the property conveyed is encumbered, reference thereto should be made in the *habendum*. If the parties to transfer enter into covenants, they should be entered after the *habendum*.

In India such phrases as “to have and to hold” or such an expression as “to the use of the purchaser” can very well be avoided as in cases except those of voluntary transfers such an expression is superfluous.

**2010 - June [1] {C}** (b) What are the do’s and don’ts which should be considered while drafting documents? (5 marks)

(c) Explain the following:
   (i) Deed pool
   (ii) Deed poll
   (iii) Indenture
   (iv) Cyrographum
   (v) Deed escrow. (2 marks each)

**Answer :**

(b) *Please refer 2006 - June [8] (a) on page no. 26*

(c) (i) **Deed Pool** : It is an arrangement wherein as many copies are made as there are parties, so that each party may be in possession of a copy.

   (ii) **Deed Poll** : A deed made and at the same time executed by single party e.g. power of attorney, is called a deed poll because in olden times, it was polled or cut level at the top. It had a polled or clean cut edge. It is generally used for the purpose of granting powers of attorney and for exercising powers of appointment or setting out an arbitrator’s award. It is drawn in first person usually.
(iii) **Indenture**: Indenture are those deeds in which there are two or more parties. It was written in duplicate upon one piece of parchment and two parts were severed so as to leave an indented or vary edge, forcing being then, rendered very difficult. Indentures were so called as at one time they are indented or cut with uneven edge at the top. In olden times, the practice was to make as many copies or parts as they were called, of the instruments as they were parties to it, which parts taken together formed the deed and to engross all of them of the same skin of parchment.

(iv) **Cyrographum**: This was another type of indenture in olden times. The word "Cyrographum" was written between two or more copies of the document and the parchment was cut in a jugged line through this word. The idea was that the difficulty of so cutting another piece of parchment that it would fit exactly into this cutting and writing constituted a safeguard against the fraudulent substitution of a different writing for one of the parts of the original. This practice of indenting deeds also has ceased long ago and indentures are really now obsolete but the practice of calling a deed executed by more than one party as an "indenture" still continues in England.

(v) **Deed Escrow**: A deed signed by one party and delivered to another as an "escrow" for it is not a perfect deed. It is only a mere writing (Scriptum) unless signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed. Escrow means a simple writing not to become the deed of the expressed to be bound thereby, until some condition should have been performed (Halsbury Laws of England, 3rd Edn., Vol. II, p. 348).

2010 - Dec [1] {C} (c) What is meant by 'recitals' as a component in a deed? What is its evidentiary value? (5 marks)

**Answer:**

*Please refer 2006 - June [5] {C} (c) on page no. 24*

2010 - Dec [2] (a) Explain the following:

(ii) Testimonium (2 marks)

(iv) Deed escrow (2 marks)
Answer:

(ii) Please refer 2007 - June [6] (b) (i) on page no. 17
(iv) Please refer 2007 - June [6] (b) (iii) on page no. 17

2010 - Dec [6] (a) Define the term ‘deed’. Explain any seven usual clauses in a deed. (8 marks)
(b) Whether an unburnt fresh hard disk in a computer is a ‘document’ within the meaning of section 3 read with section 65B of the Indian Evidence Act, 1872? Discuss with reference to case law. (4 marks)

Answer:

(a) Please refer 2009 - Dec [1] (C) (b) on page no. 29

Answer:

(b) The issue whether hard disc of a computer is a document within the meaning of sections 3 and 65B of the Evidence Act, 1872 was decided in the case Dharamvir v. CBI [148 (2008) DLT [288].

In this case it was held that hard disc is a document. The court held that as long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if it does not at present contain any accessible information.

In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record. Given the wide definition of the words ‘document’ and ‘evidence’ in the amended Section 2(o) and 2(t) of IT Act, there can be no doubt that an electronic record is a document.
(a) In India, there is no law on conveyancing or interpretation of documents. Explain how disputed ambiguous formal deeds can be judicially decided then. (8 marks)

**Answer:**

Principles of interpretation of deeds and documents are:

**(A) Formal Agreements:** The following rules of interpretation may be applied:

(i) Under Section 91 of the Evidence Act provides that a deed constitute the primary evidence of the terms of a Contract, or of a grant or of any other disposition of property.

(ii) In case of uncertainty, the rule embodied in provisions 2 and 6 of section 92 of the Evidence Act can be invoked for construing a deed.

(iii) The cardinal rule is that clear and unambiguous words prevail over any hypothetical consideration.

(iv) Sometimes a contract is completed in two parts:

(a) An executory contract is executed

(b) An executed contract

(v) The court must interpret the words in their popular, natural and ordinary sense, subject to certain exceptions as,

(a) Where the contract affords an interpretation different from the ordinary meaning of the words; or

(b) Where the conventional meanings are not the same with their legal sense.

(vi) All mercantile documents should receive a liberal construction.

(vii) If certain words employed in business, or in a particular locality have been used in particular sense, they must *prima facie* be construed in technical sense.

(viii) The ordinary grammatical interpretation is not to be followed, if it is repugnant to the general context.

(ix) If the main clause is clear and the contingency mentioned in the proviso does not arise, the proviso is not attracted at all and its language should not be referred to for construing the main clause in a manner contradictory to its import.
(x) As a general rule of construction of documents, the recitals are not looked into, if the terms of the deed are otherwise clear. If in a deed the operative part is clear, or the intention of the parties is clearly made out, whether consistent which the recitals or not, the recitals have to be disregarded.

(xi) Sometimes a standard form is used, particularly in contracts with government departments on big corporations. In these standard printed forms, words not applicable are deleted according to the requirements of individual transactions.

(B) Informal Agreements:

In interpretation of informal agreements the rule to be applied is that of reasonable expectation; that is to say the agreement is to be interpreted in the sense in which the party who used the words in question should reasonably have apprehended that the other party may apprehend them.

2011 - June [2] (b) Discuss how section 8 of the Transfer of Property Act, 1882 regarding operation of transfer has simplified ‘parcels clause’ in a deed.

(8 marks)

Answer:
The parcel includes words such as:-
(a) Messuages,
(b) Tenements,
(c) Hereditaments,
(d) Land,
(e) Water etc.

According to Section 8, operation of transfer-unless a different intention is expressed or necessarily implied, a transfer of property passes immediately to the transferee. all the interest which the transferor is Capable of passing in the property and in the legal incidence, thereof. Such incidence includes-

(i) Where the property is land, the easements annexed there to the rents and profits thereof occurring after the transfer and all things attached to the earth.

(ii) Where the property is machinery attached to the earth, the movable parts thereof.
(iii) Where the property is house, the Easements annexed thereto, the rent thereof accruing after the transfer and the locks, keys, doors windows, etc.
(iv) Where the property is a debt or other actionable claim, the securities there of but not arrears of interest accrued before the transfer.

2011 - Dec [1] {C} (a) “All instruments are legal documents, but all legal documents are not instruments.” Critically evaluate with reference to leading cases. (10 marks)

Answer:
According to Section 3 of the Indian Evidence Act, 1872, defines Document as “any matter expressed or described upon any substance by means of letter, figures, or marks, or more than one of these means, intended to be used or which may be used for purposes of recording that matter.

Examples:
(i) Writings;
(ii) Prints;
(iii) Maps;
(iv) A caricature
(v) Photo
(vi) Video etc.

However, an instrument is a specific type of legal document used or intended to be so used or capable of being used as evidence of:
— Financial / monetary / legal right or liability.
— Purports to be so created, transferred, modified, limited, extended, suspended, extinguished or recorded those rights and liabilities.

The word instrument has been interpreted in different judgements by different courts with reference to the different enactment.

Example:
1. As per Section 2(b) of the Notaries Act, 1952 and Section 2(14) of the Indian Stamp Act, 1899, the word “instrument” includes every document by which any right or liability is or purports to be created, transferred, modified limited, extended, suspended, extinguished or recorded.
4. A will is an instrument (Bishun V. Suraj Mukhi).
5. The word “instrument” in Section 1 of the Interest Act is wide enough of cover a decree (Savitribai V. Radhakishna).

2011 - Dec [2] (a) Explain the following:
   (i) Fowler’s five rules of drafting. (4 marks)

Answer:
Please refer 2005 - Dec [7] (b) (ii) on page no. 16

2011 - Dec [8] (b) What do you mean by —
   (i) Inclusive deed
   (ii) Latent deed
   (iii) Pretended deed
   (iv) Voluntary deed
   (v) Warranty deed (2 marks each)

Answer :
   (i) Inclusive Deed : An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.
   (ii) Latent Deed : Is a deed kept for 20 years or more in man’s escritoire or strong box.
   (iii) Pretended Deed : A pretended deed is a deed apparently or prima facie valid.
   (iv) Voluntary Deed : A voluntary deed is one given without any valuable consideration.
   (v) Warranty Deed : A warranty deed is a deed containing a covenants of warranty

2013 - June [2] (a) Explain the following:
   (i) Parcels clause as a component of a deed. (4 marks)
Parcels Clause

This is a technical expression meaning methodical description of the property. It is necessary that in case of non-testamentary document containing a map or plan of the property shall not be accepted unless it is accompanied by the True Copy. Usually the Parcel Clause starts with the words All Those....................... And further or description covers as per the type of property subjected to transfer under the deed. This clause includes words such as : Messuages, Tenements, Hereditaments, Land, Water etc. But use of these words has been rendered unnecessary in view of Section 8 of Transfer of Property Act, 1882. This Section has cut down the length of the deeds and done away with description of minute details of the incidents of the property intended to be conveyed.

2013 - Dec [5] (a) “Drafting may be defined as the synthesis of law and fact in a language form.” Explain. (8 marks)

Answer:

Drafting may be defined as the synthesis of law and fact in a language form [Stanley Robinson: Drafting its application to conveyancing and commercial document 1980]

(i) All three characteristics rank equally in importance.
(ii) Legal drafting is the crystallization and expression in definitive form of a legal right, privilege function, duty or status.
(iii) Legal instrument such as constitution, status, regulations, ordinances, contract, wills, conveyances, indentures, trusts and leases.

NOTE: The process of drafting operates in two planes, the conceptual and verbal besides seeking the right words, Drafting, therefore, is first thinking and second composing.

2014 - June [2] Explain the following:
(a) Reasons for drafting recitals in a deed with due caution.
(c) Drafting and conveyancing have the same meaning though these are not interchangeable. (4 marks each)
Answer:
(a) Recitals should be inserted with great caution because they precede the operative part and as a matter of fact contain the explanation to the operative part of the deed. If the same is ambiguous recitals operate as estoppel. Recital offers good evidence of facts recited therein. Recitals are not generally taken into evidence but are open for interpretation for the courts. If the operative part of the deed is ambiguous anything contained in the recital will help in its interpretation or meaning. In the same sense, it is necessary that where recitals contain chronological events that must be narrated in chronological order. Recitals carry evidentiary importance in the deed. It is an evidence against the parties to the instrument and those claiming under and it may operate as estoppel [Ram Charan v. Girija Nandini, 3 SCR 841 (1965)].

Answer:
(c) Drafting and Conveyance Distinguished: Both the terms “drafting and conveyancing” provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas “drafting” gives a general meaning synonymous to preparation of drafting of documents. Document may include documents relating to transfer of property as well as other “documents” in a sense as per definition given in Section 3(18) of the General Clauses Act, 1897 which include any matter written, expressed or described upon any substance by means of letters, figures or mark, which is intended to be used for the purpose of recording that matter. For example, for a banker the document would mean loan agreement, deed of mortgage, charge, pledge, guarantee, etc. For a businessman, document would mean something as defined under Section 2(4) of the Indian Sale of Goods Act, 1930 so as to include a document of title to goods i.e. “Bill of lading, dock-warrant, warehouse-keepers’ certificate, wharfingers’ certificate, railway receipt multi-model transport document warrant or order for the delivery of goods and any other document used in ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.
In the light of judicial pronouncements, discuss the following:
(d) Testamentary disposition is personal; it cannot be delegated to any other person. (4 marks)

**Answer:**
Testamentary disposition is the disposition or transfer of property that takes effect upon the death of the person making it. The testator retains almost entire control of the property until death. In short, it is the gift or property which takes effect at the time of the death of the person making the disposition. The transfer can be made by deed, by an inter vivos transaction, or by will. All instruments used to make testamentary dispositions must comply with the requirements of the statute of wills.
Testamentary disposition also used to refer to the process of dead persons' will being complied with by announcing the division of the assets of the dead person amongst the people whose name has been mentioned in the will.
Section 59 of the Indian Succession Act, provides for the persons capable of making wills. Accordingly, every person of sound mind not being a minor may dispose of his property by will.
The testamentary capacity is recognized only in a sound disposing state of mind. Soundness of mind denotes the mental capacity of the testator as to what he is doing, his capability of understanding his extent of his property, the person who is the object of his bounty and the persons who are thereby excluded. Testamentary disposition is personal, it cannot be delegated to any other person. A testator cannot confide to another the right to make a will for him. (*Tienouth v. Mulroney* 227 P.2d 590 (1951)).

2014 - Dec [2] Explain the following:
(a) Drafting of legal documents is a skilled job requiring observance of many do’s and don’ts. (4 marks)

**Answer:**
*Please refer 2006 - June [8] (a) on page no. 26*

2015 - June [1] (a) “Drafting of documents is very important part of legal documentation. Documents are subject to interpretation when no clear meaning could be inferred by a simple reading of documents.”
Explain this statement with reference to the rules relating to interpretation of formal legal documents. (10 marks)

2015 - June [2] Explain the following:
(d) All instruments are legal documents but all legal documents are not instruments. (4 marks)

### Repeatedly Asked Questions

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<tr>
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<th>Question</th>
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<tr>
<td>1</td>
<td>Distinguish between of 'Conveyance' and 'contract'.</td>
<td>3 Times</td>
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<tr>
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<td>06 - June [7] (a), 09 - June [3] (a) (i), 11 - Dec [7] (b) (i)</td>
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<td>2</td>
<td>Write a note on 'covenants and undertakings'.</td>
<td>3 Times</td>
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<td>10 - Dec [7] (b), 13 - June [8] (b), 14 - Dec [3A] (Or) (i)</td>
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<td>3</td>
<td>What is meant by ‘recitals’ as a component in a deed? What is its evidentiary value?</td>
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<td>06 - June [5] (c), 10 - Dec [1] (c)</td>
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<td>4</td>
<td>Explain the Testimonium</td>
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<td>Write notes on Habendum</td>
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<td>07 - June [6] (b) (iv), 10 - Dec [5] (i)</td>
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<td>6</td>
<td>Explain the following: Drafting of legal documents is a skilled job requiring observance of many do's and don'ts</td>
<td>2 Times</td>
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<td>06 - June [8] (a), 14 - Dec [2] (a)</td>
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<td>7</td>
<td>Explain the following: All instruments are legal documents but all legal documents are not instruments.</td>
<td>2 Times</td>
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<td>11 - Dec [1] {C} (a), 15 - June [2] (d)</td>
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<td>8</td>
<td>Distinguish between the following: Habendum’ and ‘reddendum’.</td>
<td>2 Times</td>
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**Motivational Quote**

“It does not matter how slowly you go as long as you do not stop.”

*Confucius*